UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

UNITED STATES OF AMERICA	
v.	No. 1:20-cr-00006-PB September 8, 2020 10:02 a.m.
CHRISTOPHER CANTWELL,	
Defendant.	

TRANSCRIPT OF TELEPHONE CONFERENCE RE: JURY INSTRUCTIONS AND MOTIONS *IN LIMINE*

BEFORE THE HONORABLE PAUL J. BARBADORO

APPEARANCES:

For the Government: AUSA Anna Z. Krasinski, Esq. (Via telephone)
U.S. Attorney's Office

For the Defendant: Eric Wolpin, Esq. (Via telephone)
Jeffrey S. Levin, Esq. (Via telephone)
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P R O C E E D I N G S

THE CLERK: For the record, the Court is in session and has for consideration a telephone conference in the United States of America versus Christopher Cantwell, criminal case number 20-cr-06-01-PB.

THE COURT: Okay. I'll remind the parties we're on the record.

All right. Let me tell you what's on my agenda and what I want to talk about, and then, after we run through my agenda, anything that anyone else wants to cover I'm happy to take up. I want to talk to you about voir dire; I want to talk to you about the way I'm going to proceed with respect to the informant, the conference I'm going to have later today on that; I want to talk to you about the jury instructions; and, if we have time, maybe we can start talking about the motions *in limine*.

So, let's start with voir dire. Have the parties submitted proposed in-court voir dire?

MR. WOLPIN: The deadline's today. We haven't submitted ours yet.

THE COURT: Okay. So, you are probably not going to have a chance to talk to me between now and next Tuesday, unless it's some kind of emergency, because I'm trying to take my first time off in about 18 months. So, if you want to raise issues with me on voir dire in a general sense now, I'm happy

to hear what you have to say, and then I'll, obviously, be reading your proposed voir dire and putting together mine when I show up on Tuesday.

Let's take the government first and then the defense. Does the government have anything you want to say about the voir dire?

MS. KRASINSKI: I don't think so. Attorney Davis and I talked about it, and I think we actually were not planning on submitting any voir dire questions.

THE COURT: Okay. And how about the defense? Anything you want to tell me in general about it, understanding you'll be submitting your specific requests at the end of the day?

MR. WOLPIN: It's hard to talk about it in a general sense. I mean, we'll present our proposal. I guess we would ask for a limited amount of time before we actually begin to address them, but, you know, I think there are things that people could expect and anticipate as far as what we want brought up with these particular jurors.

THE COURT: Okay. Well, again, I'm not sure how much time I'm going to have to speak to you in advance, but I obviously have a lot of experience doing voir dire, and I'll look carefully at your proposals and ask the ones that I think are appropriate, and you'll have an opportunity to object and ask me to do further voir dire before I complete it. So, we'll

cover it then.

Okay. So, the informant, I will be questioning the informant, and I intend to cover most but not every single one of the defendant's questions. I will not proceed in the order in which they're being asked. I will not ask them verbatim, but I will cover the vast majority of things that the defendant wants me to cover. There are a couple of things that I don't intend to cover, unless something comes up in the questioning that makes them relevant. I don't think this should be an opportunity to develop impeachment information about the informant. Obviously, if something comes up, I may need to question on those subjects, and I don't see at the present time any reason to question about gun usage. The focus is going to be what do you know about Cheddar Mane's use of drugs, and how do you know it, and I'll develop some context about their state of their interactions and knowledge, and I'll probe deeply about what he knows about drug usage and how he knows what he knows about drug usage. That's what I intend to do.

Does either party want to say anything to me about that, starting with the government?

MS. KRASINSKI: No, your Honor.

MR. LEVIN: Just to be clear, your Honor, we have it on our calendar as scheduled for 11:00, an *ex parte* phone conference. So, how will that -- will you be on that call with a court reporter, or will it just be you and the informant?

THE COURT: Yeah. No, I would never talk to anybody like this without a court reporter. My intention is to conduct the questioning under oath. The government will be permitted to attend but not to question, and I will make a transcript of the conversation available to the defense. That's my plan. Obviously, if he blurts out something that's identifying that I determine isn't appropriate for you to see, I'll redact that and note that I've redacted it and give you an opportunity to object and ask that it be disclosed. But you'll get a transcript that will fully disclose everything I've asked the informant.

MR. NEWMAN: Understood.

THE COURT: All right. Anything else you want to know about that?

MR. WOLPIN: No, your Honor.

THE COURT: Okay. All right. So, let's chat about jury instructions, and let me emphasize this is a preliminary chat. I view it as kind of a brainstorming session so that you have an opportunity to try to educate me on the instructions. I am not going to take any firm positions on issues like instructions, but I will be continuing to think about it and drafting proposed instructions, and I'll be talking to you about it again; and, of course, I'll present you with any instructions I intend to give prior to giving them at an appropriate time and give you a full and fair opportunity to

comment on them. So, at this stage I'm just trying to figure out where you differ on the instructions and how your views square with my understanding of the relevant law.

I have spent several hours looking at the relevant statutes, at the indictment and at the parties' proposed instructions and at some of the case law addressing issues that the instructions raise. But I'm not in a position today to make any definitive ruling today. I won't require the parties to take any definitive position on it. I'm more trying to just get your general thoughts about it.

So, let's start with the government's proposed instructions, and let me hear if the defendants see anything in those instructions in particular they want to draw my attention to that they think is problematic, and then we'll do the same things with respect to the defendant's instructions.

So, what is the government proposing in their instructions that the defense is concerned about?

MR. LEVIN: I think in terms of proposed jury instruction 1 the government noted that in the Eighth Circuit pattern jury instructions and also Fourth Circuit case law that this particular statute does not -- I'm sorry -- that this particular statute contains an explicit requirement regarding the defendant's subjective intent. So, we added in our instruction the elements that indicate that the communication was transmitted for the purpose of issuing a true threat.

Those are not in the government's instruction.

And I would just note that in the indictment in Count One it's indicted as for the purpose of issuing a threat and with knowledge that it would be viewed as a threat. So, the subjective element is actually in the indictment itself.

THE COURT: Yeah. So, feel free to do this as we go through this, to highlight where your instruction includes something that's not in the government's instruction, because I think it will help us get to the heart of the difference.

So, I think one of the issues I have, at least in my initial thinking about this, is that 875(b) and 875(d) are quite different statutes from 875(c), in that (b) and (d) are extortion statutes and (c) is a threat statute, and the key question for me is Elonis answers the question as to how a threat statute in (c) should be instructed, but, as far as I can tell, every court post Elonis that has looked at the question has concluded that (b) and (d) are quite different statutes and don't require the subjective intent to threaten as a distinct element, because the *mens rea* specified in (b) and (d) is an intent to extort, and so my inclination is to instruct on the statute and use the -- and follow the case law in other jurisdictions. It's not just pattern instructions. There's, as far as I can tell, an abundance of case law that distinguishes post Elonis (b) and (d) from (c). Do you have any case law that says Elonis applies in the same way to (b)

and (d) as it does to (c)?

MR. LEVIN: No, and I don't think there's any case law on point in the First Circuit that I've been able to find.

THE COURT: Let me, just so you guys know what I'm thinking of, I've read United States against White, 810 F.3d 212, a Fourth Circuit decision; I've read United States versus Killen, 729 Federal Appendix 703, a decision of the Eleventh Circuit; I've read United States against White, reported at 654 Federal Appendix 956, another Eleventh Circuit decision; I've read Hopkins versus United States, reported at 2018 Westlaw 1911805, a Northern District of Illinois decision; and I've read United States against Godwin-Painter, reported at 2015 Westlaw 5838501. All of those cases take the position that either 875(b) or 875(d) -- there's also a Third Circuit decision that I think I've misplaced -- post Elonis to suggest that the subjective intent to threaten component of 875(c) does not apply as a distinct instruction for 875(b) and (d). So, my inclination is not to include it. To the extent that the indictment includes additional mental state beyond that which is required, it's kind of surplusage, the way I would ordinarily think of it.

So, I'm inclined to craft my instructions to definitely require a *mens rea* requirement there that it requires a specific intent to extort something of value from a person. So, my inclination on that one is to track something

like the government's instruction on that particular point. If you have other issues I'm certainly interested in hearing them.

MR. LEVIN: That was the main difference. It does indicate in the government's proposed jury instruction 2 -- yeah, okay -- so that does reference the language about a threatening, a serious statement expressing an intent to injure that's also included in ours. Would that also be included in the Court's?

THE COURT: Something like that as I'm currently thinking that that would be to define it in the way the government is proposing. The difference is really is there a distinct element of subjective intent to threaten that is a component of the (c) charge but is not a distinct element of the (b) and (d) charge. So, I think I'm going to track -- I'm inclined, and, again, I'm just starting to get into this, to do what you and the government are suggesting about the two definitions, so I think that should be fine for you. It's really more the subjective intent to threaten as a distinct element.

Anything else in 2 or 1 or 2 that you wanted to call to my attention right now as we're thinking through this, understanding that you'll have a chance to say whatever you want to say about the instruction I'm giving? But this is your first chance to try to influence me, so it's helpful, if you have something, to lay it out for me.

MR. LEVIN: Nothing with regard to that.

MR. WOLPIN: I guess on that specific issue, I mean, my looking at it originally had at least been that (c) is essentially the identical language with the additional element of extort in (b). So, if you read (b) and (c) next to each other, everything tracks identically, except for the fact that (b) has the intent to extort with it. The remainder of the language involving what a threat -- what that threat is in interstate commerce, the reason I think we're asking for that mental state to track all along is because there is the same sort of criminal conduct as far as the threat. It's just whether your threat includes an additional element of intent to extort. So, I view (c) as sort of more in line with (b) than (b) and (d) to be in line, because (c) is essentially a lesser included of (b), as I read it.

THE COURT: One can question the government's strategy in pursuing (c) at all, because the government's case is really an extortionate threat case. It certainly just complicates the instructions to charge every possible statutory theory one can charge.

But I would ask you to go back and reread Elonis, and if you read the cases that I mentioned to you, you'll see that those courts see the distinction between (c) and (b) and (d) as fundamentally what was the problem in Elonis. The problem in Elonis, as seen by the Court, was that there was no *mens rea*

specified in the statute, and so the Court had to infer a *mens rea* for the statute, and it inferred one of subjective intent. And the court, in fact, in Elonis distinguished (b) from (c) precisely by noting that (b) has a specified *mens rea* element. So, to apply an additional *mens rea* element, when one is already specified in the statute, is quite a different judicial act than to apply one when one is not specified. The Court routinely, as you know, reads into statutes without a *mens rea* some kind of *mens rea* requirement. (c) doesn't have a *mens rea* requirement, and that's, I think, what is motivating the Court's conclusion in Elonis to infer one, and I think the comparison with (b) and (d) that have an expressed specific intent *mens rea* requirement justifies treating the two cases differently, as all courts that I've found have done it.

Okay. Anything else on that particular issue?

MR. LEVIN: No.

THE COURT: No? Okay. Let's go into 3, because I've got a bit of a problem with 3, and then the defense can add anything it wants. I don't know. Ms. Krasinski, do you want to try to tell me why you're trying to sneak in a recklessness requirement here, when no one other than Justice Alito appears to like that?

MS. KRASINSKI: I'm certainly not trying to sneak it in, your Honor.

THE COURT: I'm not implying you're doing anything

deliberately -- deceptively, but you get my point. In Elonis there is a majority opinion that says what (c) requires and says we don't decide on reckless, and Justice Alito likes reckless, but I haven't found any court that has endorsed reckless. Have you found any?

MS. KRASINSKI: I haven't, your Honor. I just, when I read Elonis, you know, they say that, at a minimum, we know that sending the communication for the purpose of issuing a threat and/or with knowledge that the communication would be viewed as a threat, that those are submissions. And you're right. They decline to address whether reckless disregard would be sufficient.

I just read Justice Alito's dissent to kind of go one step further than the majority opinion. As you know, Justice Alito says, well, this would be the minimum *mens rea*. But I have not found any additional case law post Elonis, so I certainly understand that the Court is hesitant to put it in, but I don't think the majority opinion should be viewed as precluding it.

THE COURT: I mean, I'll express my bias here. My bias is that Elonis was wrongly decided, and that the I think eight or nine circuits that have reached a different conclusion about the need for a subjective intent element, including the First, were right and the Supreme Court is wrong in Elonis, and I think they were motivated by a concern and an inability to

resolve the Constitutional question that, in fact, the parties presented. The statutory construction question in Elonis was never even presented to the Supreme Court. It crafted the decision itself I think because it wasn't ready to take on the true threat, First Amendment question, and I believe that the preexisting circuit law, which was nearly unanimous -- I think there was one circuit that went a different way -- was right in not requiring a subjective intent requirement. But I'm a faithful lieutenant to the Supreme Court, but I also am not someone who is just trying to push the outer boundaries of whatever opinion can be pushed. I don't see any particular basis in the text of the statute to infer recklessness, and I don't have quite the self confidence that the United States Supreme Court has that they can just remake statutes to fit whatever it is they feel should be in the statute.

So, I'm not inclined to give a recklessness instruction with respect to (c).

So, that's basically my concern about the third instruction. Does the defendant have any problem with the third instruction other than what I've just raised?

MR. LEVIN: Well, again, you know, in the indictment they've charged interstate and foreign commerce, so we added that language to our instruction. I think that was the main difference --

THE COURT: So, let me just look at.

MR. LEVIN: -- other than excising the reckless standard.

THE COURT: I'm just getting my -- a quick look at the statute. Yeah. The communication under (c) does have to be transported in interstate or foreign commerce, so I'm sure I'll give something along those lines.

Anything else in 3 that anyone wants to bring to my attention?

MS. KRASINSKI: So, I think one of the main differences between the government's instruction and the defendant's instruction is that with the *mens rea*, where the government's instruction says that the defendant sent the communication for the purpose of issuing the threat -- and I'm just going to move the "or" here, since we're taking recklessness out, or with knowledge that the communication would be viewed as a threat, that in the defendant's instruction it appears that there's an "and" rather than an "or," so it would require the government to prove both that this defendant had the purpose of issuing the threat and had the knowledge that the communication would be viewed as a threat, and I just don't think that's a correct application of Elonis. I think Elonis requires one or the other and not both. So, I think "or" is the appropriate word there.

MR. LEVIN: And, again, we were tracking the indictment, which has a threat to injure the reputation of the

victim and a threat to accuse the victim of a crime.

THE COURT: Yeah. So, Mr. Levin, and I know you're such an experienced defense attorney you probably, I'm sure you're aware of this, but the indictment-drafting strategy that the government uses in cases like this is to use the conjunctive instead of the disjunctive in indicting because of existing case law that allows them to treat it as disjunctive. So, if you've got an argument based not on what the statute actually requires but what because they alleged in the indictment they have to stick with it, you should be prepared to give me some case law on that. I haven't gone back and researched it, but it's my understanding generally, as I suggested, to the extent that they allege with knowledge and purpose and recklessly that you can disregard the surplusage part of it and just treat whatever the *mens rea* is that the statute actually requires. But if I'm wrong on that you'll present me with a good legal memo that will direct me to the case law that makes clear to me that I'm wrong on it. I'm operating under that assumption, that just because they used the conjunctive in the indictment that they're bound to -- that I must instruct the jury in the conjunctive, I don't understand that to be consistent with what the law requires. If I'm wrong on that, you'll tell me. You don't have to do it today. Okay?

MR. LEVIN: Okay.

THE COURT: All right. So, other things about 3 that

anyone wants to talk to me about?

MS. KRASINSKI: So, again, I'll just sort of highlight one difference, particularly as it relates to government's instruction 3 and contrasting it with defendant's instruction number 2, which is that the defendant's instructions tends to use this term "true threat," a phrase "true threat," whereas the government's instructions generally use the word "threat," and I think that's something that is just sort of different throughout our instructions.

My take on it, which appears to be what the Fifth Circuit, the First Circuit pattern instructions and the Eighth Circuit pattern instructions is not to use the phrase "true threat," because the statute itself doesn't use that phrase. I think the better practice is to use the language of the statute and then sort of include the definition of what a "true threat" is sort of into the definition of "threat." But that's just a difference that I would highlight in our two instructions.

THE COURT: I can tell you, and I've been thinking about this, my general view is that it is usually a mistake to take labels that lawyers use when speaking to each other and try to build them into jury instructions. The labels don't have a lot of meaningful context. Labels have to be defined, and here the statute talks about a threat, and I will instruct on what a Constitutionally sufficient threat is, but I don't prefer to use the language "true threat" because it doesn't

convey meaningful information, and it tends to raise potential for confusion; like when someone says "true threat," does that mean that they actually mean that the speaker of the threat must intend to carry out the threatened behavior? It's not true if you don't intend to actually do it. That's one meaning of "true threat." Another meaning of "true threat" might mean he might objectively intend to threaten. But that issue has not been authoritatively resolved by either the U.S. Supreme Court or the First Circuit, as far as I can tell. And I think that it doesn't produce any clarity, it potentially produces confusion, and I think the better approach is to use the statutory term and then define it in a way that it can be understood by a layperson.

Now, whether in defining it I might add the word "true" in front of "threat" just to satisfy the defendant -- I mean, I know that I approach these things rationally and I know that lawyers like to use not just reason but also emotion to present argument, that true sounds like it's a much higher standard than a threat, but that is a kind of, I don't know, a gut reaction kind of thing. It's not something that is really reasonable. I'll hear the defense on it.

At the end of the day I don't think it should be in there. If I were writing for the Court of Appeals I wouldn't put the term 'threat' in there in an instruction to the jury, but whether I put it in just to avoid the Court of Appeals

having to take some additional time to explain why it can be sufficient not to have the word "true" in there, I'll have to think about that. But I'm not inclined to caption the instruction or the element as "true threat;" I'm inclined to define the threat and possibly, I'm still thinking about it, put the word "true" in when defining what the statutory threat is.

But anything the defense wants to say in support of why I should use "true threat"?

MR. LEVIN: Your Honor, I would just, as background, and I'm not suggesting it's binding on the Court in any way, but in the case of Matthew Oliver, which was recently tried in this court, the government proposed that language and it was adopted by the Court, and that's docket number 19-cr-40, one of Judge Laplante's cases.

THE COURT: Was that an 875(c) case?

MR. LEVIN: That was a (c) case, yes.

THE COURT: Was that in front of Judge Laplante?

MR. LEVIN: In front of Judge Laplante, yes.

THE COURT: He's the expert on cyberstalking and criminal threatening. I'm just going to follow him. So, I'll get a copy of the Oliver instruction and read it over carefully. Obviously, I have a tremendous regard for Judge Laplante.

MR. LEVIN: The parties submitted joint jury

instructions that were drafted by the government, and that was where that language came from, I believe.

THE COURT: I'll take a look at Oliver.

But, go ahead. What did you want to say in response?

MS. KRASINSKI: Just that, as much respect as I have for Attorney Kinsella, it's my position that the term "true threat" shouldn't be in the instruction regardless of what he submitted in the Oliver case.

THE COURT: I mean, if I put it in, it's not reversible error; it's a judgment call about how you can most clearly describe the elements of the charge. I agree that the word "true" in front of "threat" doesn't convey clear content to a lay juror. "True" in front of "threat" conveys information to a lawyer who studied the First Amendment, because that's how the Supreme Court defined the kinds of threats that by themselves can be sufficient to support a criminal-threatening-type charge, but it doesn't convey information useful to a juror. But I'll think it through, and I'll look at Oliver, and I have tremendous regard for Judge Laplante. And I also just -- to me, whether I put it in or not put it in, I can't imagine the Court of Appeals figuring out that that's some kind of a legal error on my part, but sometimes you just say, well, all right, if the defense wants it and it doesn't muck up the charge too much, maybe I'll put it in. And, of course, I will only instruct the jury on what

the legally sufficient and necessary elements of the charge are as I determine it, but there are elements of judgment involved in how you express what is legally sufficient and legally required, and I will try to do it in a way that's as clear as possible for the jury, having had a lot of experience in instructing juries and speaking to them afterwards about the instructions that I've given them.

Okay. Anything else on 3 that anybody wants to talk about? Okay. Let's go on to 4. I think the defense has the same concerns about 4 that you had with respect to 2. Anything new and specific with respect to (d)?

MR. LEVIN: No, your Honor.

THE COURT: Okay. And cyberstalking. How do you feel about the cyberstalking instruction that the government is proposing?

MR. LEVIN: Hold on a second.

THE COURT: Again, Judge Laplante is the expert here. He did Ackell, which is the leading First Circuit case on the cyberstalking statute.

MR. LEVIN: Right. And I think that's one that we looked at as well. I can't remember how it shapes up, but ours, obviously, has more I think elements than the government's does; that there has to be a course of conduct, that the intent to harass and intimidate we broke out, that the course of conduct placed another person in reasonable fear of

serious bodily injury, that the course of conduct caused, attempted to cause and would be reasonably expected to cause substantial emotional distress. So, I think there are additional elements that aren't in the government's and then I think also additional definitions. A complicated statute.

THE COURT: Yeah. Okay. So, as I said, I'm inclined to follow -- Ackell was a charge that was examined by the First Circuit. I'm inclined to start with Judge Laplante's instruction in Ackell as a baseline and work off of that in light of what you are each proposing. So, I will look at the Ackell instruction and the Oliver instruction, because I haven't instructed on either of these statutes before, and I'll start with that as guidance. And then, to the extent you have, and you have cited in footnotes a number of decisions, I will look at those cases when considering your specific requests to the extent that they deviate from or add to what was instructed in Ackell.

Okay. Does the government want to say anything about this cyberstalking instruction?

MS. KRASINSKI: A couple of things. The first is, in looking at it yesterday as I was preparing for today, I need to submit a revised instruction on this, because I did not include that one of the means that's charged is that it placed the other person in reasonable fear of serious bodily injury to that person or that person's spouse. So, I need to update this

and submit an updated version to the Court.

But, separately, kind of one of the main differences between our instruction is whether or not the jury is required to agree unanimously on the acts that constitute the course of conduct. So, the defense has submitted an instruction that they must unanimously agree on which two or more text messages or things constituted the course of conduct.

THE COURT: Could I just interrupt you?

MS. KRASINSKI: Sure.

THE COURT: In Ackell the First Circuit resolved that in your favor, didn't the Court?

MR. LEVIN: Yes, I believe that's right.

MS. KRASINSKI: Yes, your Honor.

THE COURT: Yeah. So, I guess they're requesting it for purposes of preserving it for a Supreme Court appeal for an en banc review, but I lack the power to disregard a controlling First Circuit case. So, on that issue I don't even consider it an open question in my mind. I'm going to instruct the way the First Circuit said I should instruct.

And so, Mr. Levin, you agree with that, right?

MR. LEVIN: Well, I don't think the First Circuit said you have to instruct that way. I think they said it wasn't error not to instruct that way. So, I think that's, you know, a critical difference. But I agree that was the outcome.

THE COURT: Okay. So, on that particular issue I'm

not inclined to deviate from what Judge Laplante did in Ackell that was found to be appropriate or lawful or permissible by the First Circuit. There is one part of Ackell that I do or one part of Judge Laplante's charge in Ackell that I have some concern about, and that is -- I don't know. I'll have to look at the government's instruction. Give me one second here. Yeah. I'm a little bit concerned about the "attempted to cause" language in that instruction, because I am inclined to say, and this is something that the Court in the First Circuit in Ackell noted, as did Judge Laplante, was the kind of oddity about the statute, and I agree that it's odd and I think it could mislead a jury. I think it has to cause or would reasonably be expected to cause, and it has to be undertaken with the intent to harass or intimidate another person. So, I'm not sure how you have a distinct act of liability for attempting to cause. And this is discussed in the Ackell First Circuit decision, and I'm inclined to omit that attempts to cause.

I assume the defense would like that. I don't know if you've focused on that, Mr. Levin.

MR. LEVIN: No, no, but that sounds right.

THE COURT: You agree to Ackell, and if you want to press that argument with me I'll give the government a chance to respond on it, but when I read that reference, I know Judge Laplante -- that's an example, that's what made me bring it up,

is that's an example of where the Court said it was not error to track the statutory language, but, in fact, I think tracking the statutory language there might be more confusing to the jury than clarifying, because if you act with the requisite intent and you engage in action that would be reasonably expected to cause, it doesn't have to cause, so it just has to either actually cause or reasonably be expected to cause. That, I think, is what the focus is on that element.

The government can think about that. If you want to tell me it would be reversible error for me to take out the "attempt to cause," you could build a good legal argument, citing case law and reasoned argument, other than, well, it's in the statute and the First Circuit didn't reverse Laplante on that basis, if you can give me a different, a better-reasoned argument, you could persuade me to leave it in, but I didn't see how it clarifies the jury's obligation to leave it in.

MS. KRASINSKI: I will, your Honor.

THE COURT: It's in the statute, Judge, and if the Court said it was okay in Ackell, is there anything else you wanted to add now? You can do it later, after you've had a chance to develop a more reasoned argument.

MS. KRASINSKI: No. I'll have to go back and look at it, your Honor.

THE COURT: All right. Take a look at it and let me know what you think. Otherwise, I don't think the statute is

all that complicated. We all do this for a living, and so we all take a statute and we diagram it and we ask what's the *mens rea* element, and what are the *actus reus* elements, we kick down those, then we look at how you would logically structure an instruction. Then we read all the case law, the controlling Supreme Court, First Circuit case law to determine whether things like what the Court did in Elonis, where the Court reads things into the statute that aren't there, and we add those in, or where the Court puts a gloss on something that isn't apparent to us when we do the diagramming, and then we try to translate guidance we get from the Courts of Appeals and the Supreme Court into language that a jury can understand and is faithful to the precedent that controls us, and that's how we put an instruction together.

It seems to me a fairly simple instruction, but I will look at what Judge Laplante did in Ackell, I will build off of what the defense and the government are suggesting, and put something together for you probably by the time you start evidence.

MS. KRASKINSKI: Your Honor, I think there's sort of just one other general difference between the cyberstalking instructions, and that's sort of the extent of the course of conduct. The defendant's instructions limit the course of conduct to the communication between the victim and the defendant themselves, whereas the government's instructions and

I think the indictment includes the defendant communication both to the Child Abuse and Neglect Hotline to sort of this broader telegram chat. And so, that's just sort of one other difference between the two instructions on the cyberstalking count.

THE COURT: All right. So, Mr. Levin, if you're going to oppose that, that seems sensible to me, but to the extent that you're going to oppose that, give me some case law. It does make sense to me that the course of conduct is not limited to communications that are directly made from the defendant to the alleged victim. If the defendant acts with the *mens rea* required and with the intention of prompting a third party to engage in the conduct that is intimidating, that seems logical to me that that could be part of the course of conduct, but I have not researched the issue.

MR. LEVIN: Right. Well, again, I'm tracking the statute, which talks about intent to harass and intimidate victim 1, but if the government is suggesting that to expand the proof that the defendant intended to harass and intimidate the victim's spouse, we wouldn't object to that. I don't think the evidence supports that.

THE COURT: No. I think she means something different.

Ms. Krasinski, if I've gotten you wrong you'll interrupt me and tell me, but I think what she's saying is, We

want the course of conduct instruction to be broad enough to encompass the defendant's communications directly with Cheddar Mane and the defendant's actions that the government says are part of a course of conduct to intimidate and harass Cheddar Mane, such as contacting Child and Family Services with the intent to get them to come out and potentially remove Cheddar Mane's children, right? Is that what you're getting out, Ms. Krasinski?

MS. KRASINSKI: Yeah. And I can direct everyone to a case, it's a Fourth Circuit case, U.S. v. Bartley, 711 Federal Appendix 127, and it essentially says that the acts that constitute the course of conduct can include acts directed at third parties, you know, as long as those acts, the defendant intended those acts to harass or intimidate the victim. So, that's all we're suggesting, is that the course of conduct also can include acts directed at third parties, as long as those acts are committed with the requisite intent.

THE COURT: Well, are you saying, though, that what you're telling me is communication -- I thought you were focusing on, like, the Child and Family Services stuff.

MS. KRASINSKI: Yes, yes.

THE COURT: Are you including something else in there that I'm not understanding?

MS. KRASINSKI: So, there are two things that are charged in the indictment that are acts directed at third

parties. The first is the call to the Child Abuse and Neglect Hotline, and the second is, separate from the communications directly between Cheddar Mane and the defendant, the defendant also sort of publicly posted a photograph of Cheddar Mane's family on a group Telegram chat. So, that would be an additional act sort of directed at third parties that are both charged in the indictment and we submit are part of the course of conduct.

THE COURT: Correct. But it's harassing Cheddar Mane by taking action with respect to a third party.

MS. KRASINSKI: Yes.

THE COURT: So, you're not trying to bring in another victim. You're trying to say, when you do something like posting information on a public website, that Cheddar Mane would understand it's harassing and intimidating him, and a reasonable person in his position would understand that; the act of doing that action with a third party can be part of the course of conduct, right?

MS. KRASINSKI: Correct.

THE COURT: Okay.

MR. LEVIN: I understand that, but I don't understand where that's not reflected in the competing proposed jury instructions. It seems like both instructions get to that.

THE COURT: All right. Well, I'll take a close look at it. I get what counsel's saying, and I will look at it.

And I understand your response, but, again, I'll take a look at the case she cites, but if you could also come up with any case law to support any different view, and I'll look at which language makes the most sense to me and adopt it.

Anything else from the government on the proposed instructions?

MS. KRASINSKI: Sort of the only other kind of big issue is that it's just the appropriate definition of -- I'm sorry, where am I -- substantial emotional distress. You know, I think we can sort of come to one definition, as opposed to defining it in five or six different ways, three or four different ways, but I suspect it's something we can work through.

THE COURT: I'll work on that. I think I've gotten out -- is there anything -- I think the government has raised concerns with the defendant's instructions in ways that I can understand. Is there anything you wanted to say about the defendant's instructions that you haven't already said?

MS. KRASINSKI: No. Thank you.

THE COURT: Okay. So, this has been helpful. I think we've sort of fleshed out some of the major differences. Everybody's rights are preserved to object to whatever I decide to do, but you've given me some stuff to work with, and I've alerted you to some of my tentative thinking, and so you'll come armed with case law if you think that my tentative

thinking on those subjects is incorrect. So, that was helpful to me. Thank you.

Let's talk in general about motions *in limine*. I understand the parties haven't had chances to respond to them yet, but, again, you're probably not going to talk to me before jury selection. So, if there's anything you want to say about the specific motions *in limine*, feel free to raise them.

We'll start with the defense. You filed most of them. Why don't you tell me whatever it is you want to talk to me about with the motions *in limine*.

MR. WOLPIN: I think the primary one is the one addressing the victim's motive and bias to lie. I'm intending to submit a supplement today to that to more directly address the question. They are public statements about the awareness of their own liability, so they talk about something called "fed posting," which is essentially their understanding that the FBI and federal law enforcement is listening to what they say because it is so violent and dangerous and puts them at risk of prosecution. So, adding to this understanding of why he fears his own prosecution, it's quite clear and evident and publicly stated that they were aware of that, worried about that, and the specific context of that is an example that involves Cheddar Mane threatening to and Patriots having a segment about threatening to kill and rape a specific FBI agent and then discussing how that said posting and how that could

get that intention. We then have, obviously, the FBI itself coming to investigate him or speak with him. He knows they've listened to the recordings. Part of the recordings is threatening to rape and kill an FBI agent.

And there's other evidence that I will note in that motion that similarly addresses Cheddar Mane specifically in the role of making similar statements, including calling in to Chris's show and discussing his interest in causing harm to an FBI agent and similar things. So, ultimately I wanted to flesh out the content that this individual was well aware of his own liability before the FBI arrived at his door, which is then followed up by his acknowledgment that they held that liability over his head, and then, when you read the text of the interviewer or the interview the FBI conducted, it was a very terrible strong arm in the sense of, Here is what we want to hear, we're taking this seriously, there's threats on your life. That's why they approached him, is an effort to ultimately address that issue and making it clear what issue they want to address, according to Cheddar Mane, make it very clear to him that they are holding Bowl Control over his head to get his cooperation in the prosecution of Cantwell. The motion goes through that in more detail. The supplement attempts to flesh out his state of mind.

But we think there's sort of no credible argument at this point, when it lines up that way, that this was an honest

mind when the FBI got there, that he wasn't motivated by his own criminal liability, and that the FBI wasn't telling him what they were there to do, and, as he said himself, holding his past over his head and the FBI's statements, discuss how Cheddar Mane could disappear into sort of internet oblivion and he can go back to being Mr. Lambert instead. So, it was made evident to him that there's benefits to his participation. So, ultimately, and the government will respond as it responds, but I think a compelling and direct argument similar to the one that was made in relation to the confidential informant issue before the Court. So, that is ultimately issue number one. I think the others are more sort of more clear relevance or 609-type issues.

THE COURT: Well, let's talk about 1. So, this evidence to me is intentionally relevant for two purposes. One is to show Cheddar Mane's bias by his motive to satisfy the government and avoid criminal liability for his own actions, right? I think you have given me a tremendous amount of detail on that. I don't know how much more in your supplement you can do, but go ahead and do it. But I'm always inclined, when it comes to evidence of that sort, to give the defense a fairly wide scope here. It's important to make sure that any potential motives to falsify are brought out in front of the jury. So, that's always important, and I think it's important here, and I'm inclined to let you pursue that. I think the

question is in what ways and to what degree.

You also have a second argument. And I understand your principal defense here is not that I didn't make the communication. It's that the communication doesn't qualify as a criminal act, right? Your argument is that this was not a crime. And so, you have one, your kind of principal legal defense is, when you learn the context in which this was made you will see that the defendant did not commit a crime either because the communications are not ones that can be criminal, the acts, his spoken acts are not criminal, or the defendant did not have a criminal intent, or some combination of the two. That seems to me to be what your core defense is. Do I have that right?

MR. WOLPIN: I think you do.

THE COURT: Okay. And so, some of this may be admissible as context to give you a fair opportunity to establish that defense, and the other part of it is don't believe anything Cheddar Mane says, and then there's kind of a third portion, which you may or may not sign up for, but which I am quite confident is part of your thinking, which is, if we can show that Cheddar Mane is such a repugnant person, that he associates with such horrible persons, that these people deserve each other and I'm not going to find him guilty, that may be something you're hoping will happen as a result of that effort.

The third thing is not really a legitimate basis for admitting evidence that is not otherwise admissible, but I think the two principal reasons and permissible reasons to want to inquire into some of this evidence is to establish bias and to provide context for your principal theory of defense, and I think you should be given some scope and opportunity to pursue both of those issues. The question is how far, how much. And, certainly, and I can't make any definitive ruling now, certainly interactions, actual interactions between Cheddar Mane and the FBI are entirely fair game. They're entirely fair game. What they said to him, what he said in response, what he did, what he thought when they were contacting him, all of those things are fair game. So, where we start to have -- I start to have less clarity in my thinking is with respect to interactions that people other than Cheddar Mane had with people other than the defendant, and what they do and say and believe. To me at some point that starts to become evidence that should be excluded under Rule 403. So, just how far do you intend to go?

MR. WOLPIN: Well, I think to address that in a couple of ways, one, I think --

MS. KRASINSKI: Your Honor, can I just interrupt?

THE COURT: Stop for a second. Yes?

MR. WOLPIN: Understood.

MS. KRASINSKI: I just want to point out that I know

that this is something that Attorney Davis has been handling and working on, this motion *in limine*, in particular, so just for the purposes of the discussion now --

THE COURT: I won't make up my mind without giving Mr. Davis a chance to weigh in personally, okay?

MS. KRASINSKI: Thank you.

THE COURT: I'm just trying to get an understanding of what the defendant wants to do.

MS. KRASINSKI: Thank you, your Honor.

THE COURT: I understand. You haven't responded yet. Mr. Davis isn't on the call. This is his major area. You did the instructions, he's doing the *in limine*. I'll give him a chance to be heard. But let me just spend a few more minutes on it so that I understand the defendant's position.

MR. WOLPIN: All right. So, I think there's a lot in there, that question, but I think the -- I'll start with I think the jury needs to understand what was said to understand why he has liability. I mean, you can't make an argument that someone has potential liability without some evidence of what that liability is. We're in the unique position of the liability largely comes from recordings that exist and are undeniably him, and so we don't have sort of trials within trials about whether, you know, identification or the other issues that would maybe jumble that along. Very clear to say, you know, there is a discussion he has online as Cheddar Mane

discussing how people should basically take up the role of mass shooters, that he can't do that because he has children, and he can't do that because he has other obligations, but others need to do that and that should happen. There's the threats to the FBI agent where he's involved in and they discuss all as a group about threatening to rape and murder a particular FBI agent. I'm not saying it needs to go on for days, and it's not my style to do that, but the jury needs to hear it enough to understand why he would be legitimately concerned that the FBI could prosecute him.

THE COURT: Let me step back. So, I'm imagining here that there's going to be some information that's going to come out during the government's direct case about your client -- I don't know, I don't pay attention to it -- but he basically has some kind of a podcast or a YouTube channel or something where he makes money off of doing -- saying extreme things.

MR. WOLPIN: I mean, so obviously people, different people, characterize him differently, so take that with a grain of salt. But Cheddar Mane describes him as a shock jock with white nationalist tendencies, so he's someone who has an open forum radio show that is online, not on sort of normal radio, for two hours at a chunk, and people call in and they talk about things and, you know, white nationalists, slash, all-white, slash, Trump kind of discussions are pretty common.

THE COURT: But I'm trying to find out. It seems to

me that it's going to be hard for a lot of this not to spill into the case as part of the government's effort to prove its charge, right? There's going to be evidence that he's a white nationalist shock jock, right? There's going to be evidence that there's this entity called the Bowl Patrol that at some point decides it doesn't like him. There's going to be evidence that Cheddar Mane is part of this Bowl Patrol, right? And there's going to be evidence of what the defendant does to try to find out Cheddar Mane's -- excuse me -- not Cheddar Mane, the ultimate Bowl Patrol guy who they think is heading up this effort to, I don't know, damage the defendant's shock jock ability.

MR. WOLPIN: They make it basically a concerted effort, which he'll fully admit to, I believe, based on his prior testimony, that they intended to harass him, they intended to make him angry, their goal was to make him angry, they called his show dozens upon dozens upon dozens of times, and there's even discussion on another broadcast hoping that that ultimately shut down his broadcast service, radio show format for Cheddar Mane.

THE COURT: So, you agree that you don't have any problem with that all coming into evidence in the government's case?

MR. WOLPIN: No.

THE COURT: A white nationalist shock jock, that he

has some kind of interaction with the Bowl Patrol, that the Bowl Patrol decides it doesn't like him, that the Bowl Patrol does some things to try to damage his ability to do what he does, that he gets mad about it and wants to out somebody in the Bowl Patrol, I don't know who it is, and he wants to find that person's -- and he wants to -- excuse me. Yeah, yeah, and he wants to find -- force Cheddar Mane to give him that person's identity, right? You agree that's going to be the core part of the government's case?

MR. WOLPIN: Yes. I don't see that either side can ever effectively tell their version of events without having some portion of that and most of what you just talked about in evidence. It's entirely wrapped up with the actual exchange.

THE COURT: Let me ask Ms. Krasinski. Again, I know Mr. Davis is here, so you might not be able to answer, but it would seem to me that some of this stuff is going to be coming in just in part of your case, right, so that the jury can understand what's happening?

MS. KRASINSKI: I think some of it will. I think there are two -- so, first, Attorney Davis, one of the motions *in limine* that he filed is to exclude evidence of acts of third parties other than Cheddar Mane and Vic Mackey to cause disruption of the defendant's entertainment and media -- so, that is a motion *in limine* that Attorney Davis has filed. I do think some of it, you know, the fact that Cheddar Mane crank

calls Mr. Cantwell's show, I mean, that's certainly going to come in. There are things that Vic Mackey did or at least that Cantwell accused Vic Mackey of doing, like posting spam on Mr. Cantwell's website, that I think will come in, but Attorney Davis has filed a motion *in limine* to exclude some of these other acts.

THE COURT: I think you're getting off the topic that I'm concerned about right now, which is, I understand, you know, if other people were trying to harass him and -- if he testified he might be allowed to say some of that, some not. I'm more interested in, basically, I think what the defense wants to try to do is to make the jury think that Cheddar Mane is, and he may be thinking this, I don't know, that Cheddar Mane wants to kill blacks and Jews and that he wants to try to get that out in addition to general setting the stage for this, which is this is one white nationalist who is being -- thinks he's being harassed by another white nationalist group, and he tries to force a member of that group to out somebody in the group. That all has to come in, I think, but how much of the communications where third-party members of the group are talking about killing black people and Jews, I'm not sure how that -- that seems to go too far under a Rule 403 analysis. That's what I'm focused on now, not the question of what actions by members of the Bowl Patrol against the defendant come in or out.

MS. KRASINSKI: I think the line that I anticipate Attorney Davis will draw or attempt to, at least, is that I think Cheddar Mane's statements that relate to rape, that might show that he regarded the threat to rape as a joke might be relevant and might be admissible if the defendant can show that that statement was made before the exchange, that the statement was, in fact, Cheddar Mane's, and that the defendant knew of that statement so that he did something that would have factored into Mr. Cantwell's intent. I think that's sort of the line that we would argue applies, and that whether or not Cheddar Mane or members of his group made comments about race or ethnicity or things like that, that's kind of separate as to whether or not a discussion about f-ing someone in front of her children would be taken as a rape threat. Sort of our position is that any of those statements really have to be centered around the context here, which is rape.

THE CLERK: Judge, this is Vinny. We have the CI probably going to call in very soon. I just want to let you know.

THE COURT: Well, we have to stop. We'll stop now, then, and come back to this next week. So, just so you're understanding, what I'm looking for guidance on is where to draw the line here. I'm inclined to allow the defense to -- substantial latitude in pursuing bias arguments that Cheddar Mane is a biased witness. I'm inclined to allow evidence in

about the nature, the general nature of what the Bowl Patrol is and why it has had interaction with the defendant. That will inevitably involve some discussion of what the defendant's business is. I am inclined to allow liberal examination about communications to which Cheddar Mane was a party that could arguably suggest that he viewed the comments -- that in that context those comments would reasonably be viewed as not a threat of rape but merely a way of, I don't know, signalling or -- it's hard for me to even describe what these people do, but a sort of like chest-thumping kind of thing, and I'm inclined to allow substantial latitude to do that. I'm not inclined to allow extensive examination on unrelated positions taken by other members of the Bowl Patrol about African Americans or Jews or whatever other groups, other than to note that they are a white nationalist organization and probably allow you to say how did they get the name "Bowl Patrol," but beyond that I don't want to be spending days hearing about every outrageous thing that the Bowl Patrol people ever did or said.

MR. WOLPIN: I can say, strategically, I don't find that effective. I mean, my goal is to find examples that make the point and then move on to the next questioning, and that's sort of where I am right now. But I think some of it is understanding, you know, we're in one of these kinds of cases where these people exist in a unique ecosystem where language

that's used is simply different than any other group might use. So, I don't intend to do lengthy discussions of what other people say. I do need to make clear to the jury, however, what the Bowl Patrol is, what kind of language the group uses on a regular basis, because that's the only way our client knows them. It's not like these guys were friends in person.

THE COURT: I've got to stop, because I've got to get on to my other business.

MR. WOLPIN: Okay.

THE COURT: We'll revisit this, but I am laying out some very tentative thinking that I'm not inclined to allow substantial examination beyond getting out what the Bowl Patrol is, how it got its name, that it's generally a white nationalist, racist, anti-Semitic organization that advocates violence against minorities and not go into every instance in which they've said outrageous claims, but things that suggest that a statement from your client that, "I'm going to rape your wife in front of your children," is just a joke, I'm going to allow you to do that. Of course, to me the principal problem with the case is the statement itself appears on its face to be extortionate, and in order to be extortionate the threat to rape has to convey some meaning other than a joke. So, you come up with an explanation for that and you may have a valid defense, but without that that's the fundamental problem I have with this idea, but you're, of course, free to try whatever

defense you want. I'm inclined to give you a fair amount of space in which to try to present that. Not an unlimited amount. Rule 403 in the end does require that we keep the focus on evidence that's not cumulative, that's not so prejudicial as to substantially outweigh probative value, and I'll find that line, but I'll be looking for guidance as we go along.

All right. I've got to terminate this call, because I've got to start on my next thing. So, we'll talk again. Probably on Wednesday after jury selection we can start to hone in on some of these issues in greater detail. Okay. Thank you. That ends the call. Bye.

(WHEREUPON, the proceedings adjourned at 11:15 a.m.)

C E R T I F I C A T E

I, Brenda K. Hancock, RMR, CRR and Official Court Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of the within proceedings.

Date: 5/17/21

/s/ *Brenda K. Hancock*
Brenda K. Hancock, RMR, CRR
Official Court Reporter